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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1514

JOHN L. BRYAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, JOHN L. BRYAN, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Florida, entered in the above captioned case on November 14, 1973, Petition for Rehearing denied January 11, 1974.

OPINION BELOW

The Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, entered a judgment on the 4th

day of December, A.D., 1970, adjudging the Petitioner guilty of murder in the second degree after being charged and tried upon an indictment for murder in the first degree. Said judgment is printed herein at Page 1, Appendix A.

The Appellate Court of the State of Florida, First District, rendered its judgment reversing and remanding for new trial the judgment of the Trial Court on the 7th day of September, A.D., 1972, which is printed herein at Page 1, Appendix B. This is reported at 271 So.2d 197.

On September 7, 1972, the Appellate Court, First District, certified as a question of great public interest as authorized by Sec. 4(2), Article V, Constitution of the State of Florida, to the Supreme Court of the State of Florida. Said certificate is printed herein at Page 1, Appendix C.

On November 14, 1973, the Supreme Court of the State of Florida, entered its opinion overruling the Appellate Court, First District of Florida, and remanded for reinstatement of the guilty verdict, judgment and sentence, which is printed herein at Pages 1 through 9, Appendix D. Not yet reported.

On January 11, 1974, the Supreme Court of the State of Florida, entered its order denying the Petition for Rehearing filed by Petitioner-Respondent, which is printed herein at Page 1, Appendix E. This latter order is a judgment of Last Resort in the State of Florida.

Thereafter, the Petitioner filed his request for stay pending Petition for Writ of Certiorari to the United States Supreme Court, which petition was, in the 31st day of January, A.D., 1974, stayed until April 1, 1974. This Order is printed at Page 1, Appendix F.

STATEMENT OF JURISDICTION

The Appellate Court of the State of Florida, First District, entered its opinion reversing and remanding for new trial the judgment and sentence of the Trial Court on September 7, 1972. On the same date the Appellate Court issued its certificate of great public interest.

The State of Florida, through its Attorney General, did, on September 22, 1972, file a Petition for Writ of Certiorari with the Supreme Court of Florida.

The Supreme Court of Florida, on November 14, 1973, entered its opinion remanding for reinstatement of the guilty verdict, judgment and sentence.

The Petition for Rehearing was timely filed and denied by the Supreme Court of Florida on January 11, 1974.

The jurisdiction of this Court is involked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

The Federal Question raised in this Appeal is:

Point I

Whether Jury Instructions in a first degree murder prosecution, which failed to define "evincing a depraved mind" essential to conviction of the lesser included offense of murder in the second degree and "culpable negligence" essential to conviction of the lesser included offense of manslaughter, satisfies the requirements of due process under the Fifth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner was originally indicted for the offense of murder in the first degree. He was convicted of the lesser included offense of murder in the second degree.(App. 151) The Petitioner's Motion for New Trial was denied. (App. 156)

The events, sufficient for an understanding of the facts leading to his conviction, are as follows:

This was an altercation between Petitioner, JOHN L. BRYAN, and the deceased, GEORGE KLIKNA, outside a bar on New Years Eve of 1970. (App. 6)

John Bryan had not been drinking, (App. 7) and was at the bar with an off-duty dancer by the name of Vera Casey. The Deceased had been drinking but not to excess. (App. 9)

Two strangers walked into the bar. One became sick. (App. 10) As he started toward the restroom, he threw up, and a little of it went on Miss Casey's coat or jacket. (App. 10)

Miss Casey was not aware this happened. (App. 10)

Later in the evening, Miss Casey accused the deceased of pouring ketchup on her. The Petitioner was trying to calm her down when the bartender suggested they leave, and Petitioner readily agreed. (App. 12)

A short time later, Miss Casey reappeared in the bar, engaged deceased in friendly conversation, and he left with her. (App. 14)

Later, outside the bar, the deceased walked up to Petitioner, where he was asked if he had thrown ketchup on Miss Casey. Deceased shook his head "yes." (App. 25)

Petitioner was heard to say "you know I can take you," (App. 25) whereupon, Petitioner reached behind him and came out with a swinging blow with a pistol. (App. 27)

The gun discharged when he swung. (App. 32) It happened rather fast. (App. 35)

The gun was turned over to the law enforcement officials by the Petitioner and his attorney, after being retreaved by Petitioner from an Australian Pine Tree. (App. 39)

The medical examiner testified that death was due to a "penetrating bullet wound" to the left side of the skull. (App. 63)

The wound was accompanied by powder marks, which gave rise to an estimate by the medical examiner that the gun was fired fairly close to the point of entry of the bullet, by several inches. (App. 64)

The medical examiner traced the path of the bullet as going "slightly upward and slightly to the rear." (App. 64)

The Petitioner did not testify, nor did he call any witnesses on his behalf. (App. 76-77)

At the conference on jury instructions, the Court advised the Defendant that it purposed to give the customary mimeographed form of instructions on first degree murder. (App. 79)

Such instructions failed to define "evincing a depraved mind," an essential element for the lesser included offense of murder in the second degree; and it further failed to define "culpable negligence" an essential element of the crime of manslaughter.

Counsel for the Defendant did not object. The Jury retired at 1:55 p.m. The Jury returned at 3:32 p.m., seeking additional information, and asked the Court to have re-read to the Jury the entire testimony of an eye witness, one Ed Halligan. (App. 140) The latter had testified to the "swinging blow" with the pistol. (App. 27)

After an hour and 13 minutes of additional deliberation, the Jury returned a verdict of murder in the second degree. (App. 146)

Counsel for the Petitioner moved the Court for a new trial, citing the failure of the Court to define and explain an essential element of murder in the second degree, to-wit: "evincing a depraved mind regardless of human life" and the essential element of manslaughter, to-wit: "culpable negligence." (App. 155)

The Court denied the motion. (App. 156)

The Petitioner was sentenced to serve a term of six (6) months to 20 years. (App. 157)

SUMMARY OF ARGUMENT

The failure of the Trial Judge to perform the inescapable duty of instructing the Jury on essential elements of

lesser included offenses, and the conviction of the Petitioner on such lesser included offense, violates Petitioner's constitutional rights under the due process clause of the Fifth and Fourteenth Amendments.

Failure to charge on essential elements of the crime for which Defendant is convicted is a misleading charge and is a conviction by procedures and standards not in accordance with constitutional standards of due process protected by the Fifth and Fourteenth Amendments of the Federal Constitution. (See *Bollenbach v. U.S.*, 326 U.S. 615).

Such misdirection is not "technical" nor one which "does not affect the substantial rights of the parties," but goes to the fundamental rights of due process embodied under the Fifth and Fourteenth Amendments to the Federal Constitution.

To say that a Jury is permitted to find that specific acts amount to "evincing a depraved mind" without an appropriate legal yardstick to guide them, is to transfer to the Jury the Trial Judge's inescapable duty to charge the Jury on the correct Rule of Law applicable to the facts of the case.

Without an appropriate legal yardstick to guide the Jury in measuring the evidence is to put constitutional guarantees of due process in the hands of fact finders only and to allow each juror to fashion his own definition of the term "evincing a depraved mind" and "culpable negligence."

The effect of adopting such a rule is to allow the Court to evade their inescapable duty and responsibility to clearly and accurately charge the Jury on the essential Rule of Law applicable to the facts of the case.

The excellence of the Jury system is deminished below the due process requirements of the constitution.

ARGUMENT

THE FAILURE TO DEFINE "EVINCING A DEPRAVED MIND" AND "CULPABLE NEGLIGENCE" ESSENTIAL TO A CONVICTION OF LESSER INCLUDED OFFENSES OF MURDER 2 AND MANSLAUGHTER IN FIRST DEGREE MURDER PROSECUTION, DID NOT SATISFY THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS

The failure of the Trial Judge to exercise his inescapable duty to charge the Jury on the Rule of Law as to the essential elements of the offense for which the accused is charged and to each lesser included offense violates the Fifth and Fourteenth Amendments of due process for the following reasons:

First: The Trial Judge has an inescapable duty to guide and assist the Jury toward an intelligent understanding of the legal issues involved in a criminal prosecution. (See *Elbel v. U.S.*, 364 F.2d 127, 1966) This duty is not fulfilled by mere abstract statements of legislatively created definitions which do not have a commonly understood meaning and fails to satisfy the common law duty of the Trial Judge to instruct the Jury upon matters of law emerging upon the evidence. (*Hale, The History of the Common Law of England*, pages 164 and 165)

Section 782.04 Florida Statutes, defines murder in the second degree as follows:

> When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty years.

Section 782.07 Florida Statutes, defines manslaughter as follows:

> The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.

No where in the Court's instructions to the Jury did the Trial Court give to the Jury any explanation or definition as to the correct legal meaning of the term "evincing a depraved mind" and "culpable negligence" which constituted essential elements of the charged offenses of murder in the second degree and manslaughter.

Secondly, the proper conduct of the trial cannot be assured sufficient to establish due process safeguards where the Jury is left to its own understanding of undefined legal terms such as "evincing a depraved mind" and "culpable negligence." (See *Bollenbach v. U.S.*, supra.; *Mullaney v. Wilbur*, CA1, 14 Cr.L. 4151, 473 F.2d 943; *U.S. v. Escamilla*, CA, 11 Cr.L. 2516, 467 F.2d 341)

Jury instructions meet due process standards under the Fifth and Fourteenth Amendments only if they *clearly and accurately* state the Rules of Law by which the Jury is to be guided in its deliberations. (See *U.S. v. Grunewald*, 233 F.2d 556, 2d CA, 1956) If by reason of the failure to clearly and accurately state the essential elements of the crime for which an accused is being prosecuted, the Jury becomes confused, the resulting prejudice is not technical but fundamental and prejudicial. (*Robles v. State*, 188 So.2d 789, Supreme Court of Florida, 1966; *Canada v.*

State, 139 So.2d 173; *Matley v. State*, 20 So.2d 798; *Croft v. State*, 158 So.2d 454, 32 Fla. Jur. "Trial" Sec. 186)

Bollenbach v. U.S., supra., governs this case. Even though in Bollenbach the Judge misguided the Jury with an erroneous "presumption of guilt" instruction given as a guide and in the instant case the Judge failed to guide the Jury as to essential elements of the lesser included crimes, the distinction is constitutionally irrelevant. As Holmes stated in Bollenbach, "A charge should not be misleading." (See *Agnew v. U.S.*, 165 U.S. 36, 41 L.Ed. 624, 17 S. Ct. 235)

Standards by which guilt is determined in our Courts, which go to protecting fundamental safeguards of due process, are never technical. These are in the "fundamental criteria" class. Failure to fulfill the duty imposed by law upon the Trial Judge to clearly and accurately define the Rule of Law under which Defendant is being tried, is a lack of due process. (See *Mullaney v. Wilbur*, supra.)

CONCLUSION

The Judgment of the Supreme Court of Florida should be reversed for the foregoing reasons.

Respectfully submitted,

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Daytona Beach, Florida 32015
Attorney for Petitioner

APPENDIX A

On December 4, 1970 there was filed in the office of the Clerk of the Circuit Court of Volusia County, Florida and recorded in Circuit Court Minute Book 107, at Page 253, a Judgment and Sentence, in the words and figures following:

JUDGMENT AND SENTENCE

State of Florida
vs. Case No. 2
John L. Bryan

You, John L. Bryan being now before the Court, attended by your attorney, Ralph Clayton and you, been tried and found guilty of the crime of Murder in the Second Degree the Court adjudges that you are guilty of said offense. Do you have any cause to show why the sentence of the law should not be pronounced upon you? Saying nothing sufficient, it is the sentence of the law and such is the judgment of the Court that you, John L. Bryan, be committed to the custody of the Division of Adult Corrections of the State of Florida, to be imprisoned by confinement at hard labor for the term of Not less than 6 months nor greater than 20 years with credit for jail time of 317 days, in the institution in the State Correctional System to which the Division of Corrections may cause you to be conveyed or thereafter transferred, and the Sheriff of Volusia County, Florida, is hereby ordered and directed to deliver you to the Division of Corrections of the State of Florida, with a copy of this Judgment and Sentence forthwith. The Court does now advise you that it is your right to appeal from this judgment and sentence within 30 days from this date. If insolvent Court will appoint Counsel for

Appeal and pay costs of $23.50 which includes $1.00 for Police Academy. Costs: for J.P. Warrant $7.50; Check $15.00 & $1.00. Academy: $23.00.

/s/ Robt. H. Wingfield
Circuit Judge

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1972.

JOHN L. BRYAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. 0-300

Opinion filed September 7, 1972.

An Appeal from the Circuit Court for Volusia County. Robert H. Wingfield, Judge.

Manuel M. Garcia; and Ralph R. Clayton, of Clayton, Ray & Dickey, for Appellant.

Robert L. Shevin, Attorney General; Nelson E. Bailey and A.S. Johnston, Assistant Attorneys General, for Appellee.

JOHNSON, J.

This is an appeal from a judgment and sentence based upon a jury verdict of guilty of murder in the second degree, in which the sentence was an indeterminate term of imprisonment of not less than six months nor more than twenty years.

The appellant had been indicted by a grand jury charging him with murder in the first degree.

At trial, appellant did not submit any evidence; but at the conclusion of the State's testimony, did make a motion for judgment of acquittal, which was denied, and

the case went to the jury upon the testimony submitted by the State, after arguments by respective counsel, and charges given by the trial court to the jury. After conviction, a motion for a new trial was denied, hence this appeal.

Inasmuch as the points on appeal which are determinative of our decision in this case do not involve the sufficiency or lack of sufficiency of evidence in support of the verdict, we will summarize very briefly only enough of the evidence and the trial proceedings preceding the instructions to the jury, as we deem necessary to lend sequency to our opinion.

On New Year's Eve, December 31, 1969, at, in or near a bar in Volusia County, Florida, some trouble arose between the appellant and the deceased in this case, which culminated in the appellant shooting the deceased, causing his death. There was some evidence which tended to support the theory that the shooting was not intentional, but that the intent of appellant was to hit the deceased with the pistol instead of shooting. This was the claim of appellant as shown from the questions propounded on cross-examination to the State's witnesses. Inasmuch as this case is to be remanded for a new trial, we will not further dwell on the questions of fact and evidence.

We now come to the points on appeal, as raised by assignments of error numbered 3 and 5, and 4 and 5, which charge error by the trial court in failing to explain or define to the jury the technical meaning of certain essential elements of the two crimes which were included in the indictment as lesser included offenses, to wit: the meaning of the words "evincing a depraved mind", as embraced in the charges of second degree murder, and the words "culpable negligence" as embraced in the charge of manslaughter.

The instructions to the jury by the trial court in defining murder in the second degree, merely tracked the statute (F.S. §782.04(2)), in which the technical words "evincing a depraved mind" were used without defining to the jury just what said words meant or without giving the jury some guidelines or examples of what was the common understanding of these words. We think this was error on the part of the trial court, and we will give our reasons for so thinking hereinbelow.

Also, in the instruction to the jury as to the lesser included offense of manslaughter, the court again tracked the statute (F.S. §782.07) wherein there appeared as essential elements of the crime, the words "culpable negligence". No further explanation of these technical terms was made. This, we think, was error, also, and base our opinion on the citations of law hereinbelow.

First, the recommended Standard Jury Instructions, as promulgated by the Supreme Court of Florida, as the same relates to the offense of murder in the second degree, in addition to substantial tracking the statute, goes further in explaining what is meant by the terms "evincing a depraved mind", and giving some commonly understood examples of said terms or words. The standard instruction to the jury was the culmination of extensive work by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, which Committee was composed of many very able jurists and trial attorneys. Any substantial deviation from use of these instructions will almost always end in error on the part of the trial court. In the case sub judice, the failure to follow the instruction given without some explanation or definition of the terms used, left to the individual juror the question of just what was said juror's definition of the words in question. The words, "evinging a depraved mind" and "culpable negligence" are not such

as are commonly used in every day life and conversation. The individual jurors could therefore make different determinations of the meaning of the terms. This could necessarily become prejucicial to the accused.[1]

That which is stated supra and to the Standard Jury Instructions is eqully applicable to the instructions on manslaughter. "Culpable negligence" is defined in the recommended instruction, and this should have been included in the instruction to the jury on the charge of manslaughter, which was not done. These terms are also on the technical side and were terms that are not commonly used in everyday conversation. The trial court should have defined to the jury what the court considered to constitute "culpable negligence" and we think this was prejudicial error. What constitutes "culpable negligence" is so technical that the Supreme Court of Florida devoted the major portion of one of its opinions[2] in explaining what it means. Also see McCullers v. State, 206 So.2d 30 (Fla. App. 4th, 1968).

The fact that the appellant did not request further explanatory instructions does not alter our decision that fundamental error was committed requiring a reversal of this case and remand for a new trial, because the trial court was obligated to instruct the jury on the elements necessary to convict whether or not requested to do so.[3]

Therefore, because of the errors in instructions to the jury, the judgment and sentence are reversed and this cause remanded for a new trial not in conflict with the holdings of this opinion.

Reversed and remanded for a new trial.

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[1] 16 Fla. Jur., Homicide, §158, p. 503.

[2] Smith v. State, 65 So.2d 303 (Fla. 1953).

[3] Robles v. State, 188 So.2d 789 (Fla. 1966).

WIGGINTON, J., CONCURS. RAWLS, Acting Chief Judge, SPECIALLY CONCURS.

RAWLS, Acting Chief Judge, Specially Concurs.

I concur in the reversal of the instant judgment and in most respects with the opinion authored by my brother, Johnson. However, the statement, viz.: "Any substantial deviation from use of these instructions [Standard Jury Instructions] will almost always end in error on the part of the trial court." gives me considerable concern. It is my view that the Standard Jury Instructions constitute an excellent guideline for trial judges[1] but do not posses the characteristics of inviolability. For example, in Padgett v. State[2] our brother, Carroll, pointed out that the Standard Jury Instructions in Criminal Cases relating to the crime of manslaughter are deficient in that "to instruct a jury upon the principles of simple negligence in a case where the only offense that would be the subject of criminal condemnation is culpable negligence, is the same posture as instructing the jury on irrelevant issues, which is condemned as being misleading to a jury." It is interesting to note that the recommended Standard Jury Instruction as to gross negligence in civil cases apparently finds it unnecessary to extensively define "simple negligence."

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[1] The Supreme Court in approving the report of the Committee on Standard Jury Instructions in Criminal Cases emphasized that same did not relieve the trial judges of their responsibility under the law to properly and correctly charge the jury in each case.

[2] Padgett v. State, ____ So.2d ___ (1 Fla. App. 1972), opinion filed August 10, 1972, not yet reported.

APPENDIX C

[Caption omitted in printing]

CERTIFICATE

This Court having rendered its decision in the above cause by opinion filed on September 7, 1972, does hereby determine and certify that this decision is one which passes upon a question of great public interest as contemplated by Section 4(2), Article V, Constitution of Florida, which question may be stated as follows:

> IS THE FLORIDA STANDARD JURY INSTRUCTION IN CRIMINAL CASES RELATING TO THE OFFENSE OF MANSLAUGHTER A CORRECT AND ACCURATE STATEMENT OF THE LAW AND A FULL AND COMPLETE INSTRUCTION TO THE JURY IN THE TRIAL OF SUCH OFFENSE AS HELD BY THIS COURT IN THE CASE SUB JUDICE, OR IS IT AN INCORRECT AND INACCURATE STATEMENT OF THE LAW AND AN ERRONEOUSLY MISLEADING INSTRUCTION TO THE JURY IN THE TRIAL OF SUCH OFFENSE AS HELD BY THIS COURT IN THE CASE OF CLAUDE PADGETT v. STATE OF FLORIDA, CASE NO. P-470, OPINION FILED AUGUST 10, 1972?

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court, this 7th day of September, A.D. 1972.

/s/Raymond E. Rhodes
Clerk

A True Copy ATTEST:
/s/ Raymond E. Rhodes
Clerk, First District Court of Appeal
Tallahassee, Florida

APPENDIX D

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1973

STATE OF FLORIDA, Petitioner,	)	
	)	CASE NO. 42,849
v.	)	
JOHN L. BRYAN, Respondent.	)	

Opinion filed November 14, 1973

Writ of Certiorari to the District Court of Appeal, First District

Robert L. Shevin, Attorney General and A.S. Johnston, Assistant Attorney General, for Petitioner

Manuel M. Garcia, for Respondent

DEKLE, J.

Certified question hereinafter appearing vaults this second degree murder conviction to our Court for review upon challenged jury instructions,[1] as reported at So.2d (Fla.App.1st 197).

Respondent-defendant was indicted by the Volusia County Grand Jury for the crime of first degree murder

[1] Fla. Const. art. V, §3(b)(3)(1973).

in a New Year's Eve murder in a bar. The testimony presented at the trial established that some trouble arose between the respondent and the deceased which resulted in the respondent shooting the deceased causing his death. Other evidence offered by the State indicated that the shooting may have been unintentional and that the defendant meant instead to strike the deceased with the pistol. The jury adjudged the defendant guilty of second degree murder and he was given an indeterminate sentence of not less than six months nor more than twenty years.

At the close of all the evidence, the trial judge without any objection from counsel gave some 23 jury instructions on the criminal offenses of murder in the first degree, in the second degree and manslaughter. However, in his instructions, the judge tracked the statute (§782.04(2) on second degree murder) and did not define the terms "evincing a depraved mind" in the second degree murder charge and "culpable negligence" as related to manslaughter. Respondent-defendant moved for a new trial challenging the propriety of the jury instructions pertaining to murder in the second degree and manslaughter. Upon review, the trial judge denied this motion.

The First District Court reversed and remanded for a new trial on the ground that the trial judge in his instructions to the jury failed to defind and explain the meaning of "evincing a depraved mind" and "culpable negligence." According to the district court, these legal terms are not "commonly used in every day life and conversation" and accordingly should have been defined and explained by using common everyday examples, such as those stated in the Florida Standard Jury Instruction

for Criminal Cases.[2] The court asserted that "any substantial deviation from the use of these instructions [Standard Jury Instructions] will almost always end in error on the part of the trial court." In conclusion, the district court relied on *Robles v. State*, 188 So.2d 789 (Fla. 1966), and said the trial judge's action constituted fundamental error notwithstanding defense counsel's failure to object prior to the jury instructions.

One month before the First District rendered its opinion in the present case, the same DCA on August 10, 1972, filed an opinion in Padgett v. State, Case No. P-470 ___So.2d___(197).[3] There the First District in reversing the defendant's conviction and ordering a new trial found that the trial judge's jury instruction on manslaughter explaining and defining the term "simple negligence" in addition to "culpable negligence" was misleading and prejudicial to the defendant. In reaching this conclusion, the First District Court recognized that the jury instruction given by the trial judge tracked the Florida Standard Jury Instructions for Criminal Cases. Nevertheless, the DCA said these Standard Jury Instruc-

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[2] "MURDER- SECOND DEGREE - Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without a premeditated design to effect the death of any particular individual.

"An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act (or a series of acts) which (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another (2) is done from ill will, hatred, spite or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life."

[3] The First District has entered an order staying the proceedings in *Padgett* pending the outcome of the present case in this Court.

tions are not to be administered "automatically or blindly regardless of the circumstances." In this connection, it was held in light of the facts presented that the instruction including an explanation of "simple negligence" confused and mislead the jury.

In reviewing its opinions in *Padgett* and the present case, the district court recognized the possibility of an inconsistency in those decisions and accordingly certified the instant case to us via the following query:

> "Is the Florida Standard Jury Instruction in Criminal Cases relating to the offense of manslaughter a correct and accurate statement of the law and a full and complete instruction to the jury in the trial of such offense as held by this Court in the case sub judice, or is it an erroneously misleading instruction to the jury in the trial of such offense as held by this Court in the case of Claude Padgett v. State of Florida, Case No. P-470, Opinion Filed August 10, 1972?"

The Florida Jury Instructions should be used, to such extent as may be applicable in the judgment of the trial court, but it does not follow, as the First District seems adamant in saying, that such instructions must be literally given in each and every case,[4] and even in the instance where no objection has been made (as here) to a charge which varies from the standard charge; saying that "Any substantial deviation from use of these instructions will almost always end in error on the part of the trial court."

Our caveat in the general approval of these, as in other jury instructions (240 So.2d 472 (Fla. 1970)), makes express reference to the fact that the approval is only "generally" of "the theory and technique" involved "as

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[4] Acting Chief Judge Rawls expresses a similar reservation in DCA special concurring opinion.

recommended by the Committee and embodied in its proposed instructions."

We then said:

> "The Court will, accordingly, authorize the publication and use of such instructions, but without prejudice to the rights of any litigant objecting to the use of one or more of such approved forms of instructions. The Court recognizes that the initial determination of applicable substantive law in every case should be made by the trial judge and that it would be inappropriate for the Court at this time to consider the recommended instructions with a view to adjudging that the legal principles embodied in the recommended instructions correctly state the law of Florida. Similarly, the Court recognizes that no approval of the forms by the Court could relieve the trial judge of his responsibility under the law properly and correctly to charge the jury in each case as it comes before him. This order is not to be construed as any intrusion on that responsibility of the trial judges. The Court is confident that the forms of instructions recommended by the Committee state as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable language."

It is apparent that the Supreme Court's approval of recommended committee instructions is not iron clad or carte blanche and must be applied in each instance as appropriate.

By this Court's approval of the jury instructions for publication, it was not intended that they be iron clad, because we recognized the importance of the trial judge on the scene who has the "feel" of the case, the psychology of its movement through trial and what aspects appear from subtle inflections and overtones to be important in the jury's mind and for its decision. That

is one of the reasons that a trial court's decision has historically had the presumption of correctness on appeal. These are matters, as we have repeatedly said, that are not apparent from the "cold record". What is important is that sufficient instructions–not necessarily academically perfect ones– be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them. The evidence presented in particular cases will, of course, often vary what instructions apply, or whether certain instructions apply.

We do not deprecate the district court's strong support of our approved jury instructions; their acceptance and use are indeed encouraged; we simply acknowledge that these "approved instructions" are "standards" and a slight deviation is not fatal. Neither can they be perfect in anticipating the exact situation in every case, nor all that will occur in a trial, including the many facets which take place in the drama of the courtroom. Only the trial judge as the "producer and director", in a sense, on the stage during the "production" can most successfully submit the entire drama to a fair judgment of the critics, namely, the jury. The appellate courts' "morning reviews" are secondary at best and must deal only with the essential correctness of applicable law after the curtain has been brought down at the trial level.

Addressing the immediate question, we agree that the definition in the standard jury instructions of *culpable negligence* would be desirable but in the case *sub judice* we do not find, in absence of objection, its exclusion to be fundamental error as a basis for reversal. Likewise, the elaboration in the standard charge on *second degree* murder would have been appropriate and even wise to

add to the charge below.[5] This would have enlarged the use of the words "a depraved mind regardless of human life" but, absent objection, the failure to add this enlargement of the statute by the standard charge was not fatal.

We disagree that the term "depraved mind regardless of human life" is one which of necessity, absent a request for an instruction or an objection to its not being given, creates fundamental error. It is frankly our view that the average juror pretty well understands what a depraved mind is, and particularly where it is noted at least in partial definition as one which has no regard for human life. This was sufficient for the jury's evaluation in our judgment and we do not find the charges as given to be so recondite in their meaning as to escape the jury's understanding. Sometimes we underestimate the intelligence and comprehension of our juries; they do not have to have every single detail spelled out to them, for they are accepted on the basis of their average and ordinary understanding and intelligence in the ordinary matters of life and in applying the evidence. Furthermore, jurors enjoy the benefit of their composite knowledge, and the privilege of requesting further instruction if desired.

The charge actually given was the historical instruction given over hundreds of cases during periods prior to the new suggested standard charge in which convictions have been upheld. The definition given of second degree includes the words mentioned of:

> "Perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life. . . ."

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[5] See footnote 2.

Then follows the manslaughter definition as: "The killing of a human being by the act, procurement, or culpable negligence of another . . ." where not excusable homicide nor murder as hereinabove defined.

The intentional and forceful striking of another person in anger with a loaded pistol (taking this version of the evidence most beneficial to the defendant) which results in the discharge of that weapon, killing the victim, seems rather plainly to fall within the second degree murder conviction as "perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life," although the defendant appears to have received the jury's benefit of a doubt in dropping down to the lesser degree of manslaughter as "the killing of a human being by the act, procurement, or culpable negligence of another" so that the defendant seems to have been rather fortunate at the jury's hands and not to have suffered any alleged prejudice from "misunderstanding" of these terms.

The giving of "examples" of the terms involved, as the district court suggests, can itself be dangerous for the court; it may easily lead to confusion or inapplicability of the evidence peculiarly involved, as the district court suggests, can itself be dangerous for the court; it may easily lead to confusion or inapplicability of the evidence peculiarly involved in the case, and can as well constitute an improper comment upon the evidence by the court. We therefore do not join in this recommendation for related examples by a court beyond those which are in the standard instructions or which present themselves as particularly applicable to the facts at hand. This point is demonstrated by the same district court's contemporary holding in *Padgett v. State*, supra, reversing the trial court for indulging in such an inappropriate reference to a definition of simple negligence which is in the man-

slaughter charge at p. 91 of those same Supreme Court Standard Jury Instructions for suggested guidance. The district court's point in *Padgett* was that the defendant could only be found guilty of the charge of manslaughter if his negligence was culpable and that therefore a definition of simple negligence provided the jury with a basis for a possibly inappropriate application of such other definition given of simple negligence merely by its being contained in the court's charge.

The reference in the standard charge to the definition of ordinary or simple negligence would appear to us to be a very logical contrast to the culpable negligence that was required in *Padgett*. Sometimes such contrast best demonstrates the real meaning of that which is involved and since the court's overall charge makes it clear that it is culpable negligence that is required, it seems clear to us that a jury of the required ordinary understanding would apply such requirement of culpable negligence and would treat the related definition of simple negligence as intended, namely, the contrasting simple negligence definition as an aid in arriving at what is culpable. The late eminent and erudite Justice Campbell Thornal applied just this contrast to arrive at what became a reasonable and understandable meaning of the distinction between simple, or ordinary, negligence and the contrasting gross negligence applied in then applicable guest passenger situations under the old guest statute. Justice Thornal described the latter as being that which was "most likely" to cause harm to others.[6]

If we must choose between the two "theories" or viewpoints of *Padgett* and *Bryan sub judice* as to our Supreme Court Instructions, issued from time to time, we

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[6]Webster v. Kemp, 164 So.2d 814 (Fla. 1964).

would have to "go with" the view in *Padgett* that they are not to be literally applied in every case, the object being to make the pattern fit the cloth rather than the cloth the pattern.

We must retain our sense of humor in viewing such matters, as is smilingly reflected in the jestful comment enjoyed privately in our profession that "the Supreme Court is not infallible because it is always right but because it is always last!"

Absent objection to the charges in question, and finding no fundamental error, we view the charges of the trial judge as being sufficient and proper under the circumstances before the court at the trial.

The question certified is in the alternative. We answer affirmatively that Standard Jury Charge for Criminal Cases relating to manslaughter is correct and was proper to have been given, but the more limited charge *sub judice* did not constitute fundamental error justifying reversal.

The cause should accordingly be remanded for reinstatement of the guilty verdict, judgment and sentence.

It is so ordered.

CARLTON, C.J., ROBERTS, ERVIN and McCAIN, JJ., Concur

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1974
FRIDAY, JANUARY 11, 1974

[Caption omitted in printing]

On consideration of the petition for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, McCAIN and DEKLE, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By:/s/Kay O. Yert
Deputy Clerk

Y
CC: Hon. Manuel M. Garcia
Hon. A.S. Johnston
Hon. Robert H. Wingfield, Judge
Hon. Raymond E. Rhodes, Clerk

APPENDIX F

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1974
Friday, February 1, 1974

[Caption omitted in printing]

Petitioner has filed motion for stay and upon consideration thereof said motion is granted and proceedings in this Court are stayed and further proceedings in the First District Court of Appeal and in the Circuit Court in and for Volusia County, Florida are hereby stayed to and including April 1, 1974 to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court, and it is further

ORDERED that this stay be subject to the posting of an appeal bond in an amount and on conditions to be fixed by Circuit Judge Warren H. Cobb, Daytona Beach, Florida.

A True Copy

TEST:

/s/ Sid J. White
SID J. WHITE
clerk Supreme Court.

Y
CC: Judge, Warren & Garlovsky
(Hon. Dan R. Warren)
Hon. Manuel M. Garcia
Hon. A.S. Johnston
Hon. V.Y. Smith, Clerk
Hon. Warren H. Cobb, Judge
Hon. Stephen L. Boyles